

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 726 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

and

MR.JUSTICE H.K.RATHOD

- =====
1. Whether Reporters of Local Papers may be allowed : YES  
to see the judgements?
  2. To be referred to the Reporter or not? : NO
  3. Whether Their Lordships wish to see the fair copy : NO  
of the judgement?
  4. Whether this case involves a substantial question : NO  
of law as to the interpretation of the Constitution  
of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge? : NO

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SATYANARAYAN RAMJILAL PEDIWAL

Versus

STATE OF GUJARAT

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Appearance:

MR PM VYAS for Petitioner

MR SP DAVE for Respondent No. 1

MR UDAY VYAS for Respondent No. 2

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CORAM : MR.JUSTICE M.S.PARIKH and

MR.JUSTICE H.K.RATHOD

Date of decision: 15-16/12/1999

ORAL JUDGEMENT

1. This conviction appeal arises from the judgment and order dated 16/7/1990 passed by the learned Addl. City Sessions Judge, Court No.10, City of Ahmedabad in Sessions Case No. 323/1989. The appellant herein,

referred to as the accused, faced charge to the effect that at about 4.30 O'clock in the afternoon on 24/6/1989 the accused kept in his possession 53,000 tablets Diazepam which is a psychotropic substance while he was present near Hari Om Market, Murli Market, near the area known as Revdi Bazar in the City of Ahmedabad without pass, permit or licence and thereby he committed offence punishable u/S. 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act'). Upon the trial for the said charge and considering his defence as well as after hearing the Ld. Advocates for the respective parties the Ld. trial judge found the accused guilty of the offence punishable u/S. 22 of the NDPS Act and convicted him for the said offence and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay fine of Rs.1,00,000/-, in default to undergo R.I. for a period of two years with direction that the accused shall be given set off for the period during which he remained in judicial custody as an under trial prisoner. This conviction and sentence has been subjected to challenge by the accused before this Court.

2. In order to appreciate the submissions made on behalf of the accused before this Court as also in order to appreciate the version of the prosecution in reply, it would be appropriate to set out the facts of the case of the prosecution and defence as under :-

3. There was a specific information reduced in writing to the effect that one person was to carry a parcel near the office premises of Dolphin Services, 2nd floor, Murli Manohar Market, Revdi Bazar, Kalupur, Ahmedabad, which activated the officers of the Customs and Central Excise Department for laying raid at around 4.30 p.m. on 24/6/1989. It was noticed that the accused was carrying a parcel in his hand near the said office premises. He was, therefore, accosted in the presence of two Panchas who were kept present by the Custom officers. The present accused who had a parcel in his hand was brought to the office of the customs, Paldi Division, Paldi, Ahmedabad, along with the Panchas where detailed panchanama in the presence of the panchas was prepared, and the contents found from inside the parcel were noted. As per the prosecution theory, inside the parcel, there were 53 plastic packets, each plastic packet containing 1000 tablets. So, in all there were 53000 tablets of total price of Rs.2,65,000/- which according to the prosecution was the international market value of those tablets. The present accused could not produce any voucher or permit or licence for keeping the aforementioned 53,000 tablets in his possession. As per

the prosecution version these tablets were manufactured from (1) Diazepam, (2) Promltrearine, (3) Diphen Hydramine and (4) Binding Agent. As per the prosecution version, these tablets were prepared out of prohibited psychotropic substance, namely Diazepam which has been listed at entry no. 43 of the Schedule appended to the NDPS Act. The seizure of the aforesaid tablets was effected under a Panchnama drawn on the same day i.e. on 24/6/1989, which was completed at about 11.00 a.m. As per the story put forth by the complainant, on personal search of the accused one consignment note bearing No. 118334 dated 20/6/1989 issued by Dolphin Services, Bikaner pertaining to the transport of the said parcel containing the aforesaid tablets was also recovered by the raiding and searching party.

Thereafter statement of the accused Satyanarayan Periwal was recorded on 25/6/1989 u/S. 67 of the NDPS Act in which the accused made these admissions and statements : He is B.Com. and LL.B. Part-I. He has two factories in Bikaner (Rajasthan) - one is known as Dexo India Electricals wherein electrical bulbs are manufactured and which is situated at G.1/217, Bichwal Industrial Area, Ganganagar Road, Bikaner; his second factory is located at G.1/213 Bichwal Industrial Area, Ganganagar Road, Bikaner and it is styled as Dex India in which there are four partners, namely he himself, his brother Shyam Sunder Periwal, his mother Kamladevi and his brother's wife Sulochana Nandkishor Periwal. For his second factory he has taken a loan of Rs.2,81,000/- from Rajasthan Finance Corporation, which was sanctioned either in August or September 1988 and thereafter he purchased capsules for the purpose of filling medicines and tabulating machines for manufacturing capsules and tablets even though he did not possess any licence for his second factory. He knew that it was necessary to have a licence from the Health and Medicine Department for manufacturing any medicine and that he also did not possess any licence of Drugs Controller and that the Government, till the date of his statement, had not issued any licence to the accused or his factory. He had booked a parcel containing 53,000 tablets with Dolphin Services at Bikaner on 20/6/89 and this parcel was to be despatched through Dolphin Services and he had taken the delivery from Dolphin Services, Air courier, 2nd floor, Murli Manohar Market, Near Hari Om Market, Revdi Bazar, Ahmedabad. After taking delivery at 4.30 p.m. of the said parcel on 24/6/89, the Customs Officer made inquiry from the accused about the said parcel in presence of two panchas whereupon he declared that the parcel contained 53,000 medicine tablets and he was thereafter taken to

the Customs Office, Paldi, where in presence of the Panchas the parcel was opened and it was found that the parcel contained 53,000 psychotropic substance tablets and on one side of these tablets "MX" was written and on the other side "R/L" was written in English which indicated that these were the markings on the tablets and that the market value of these tablets was Rs.2,65,000/-, the value of each tablet was Rs.5/-, that under the Panchnama seizure was made in the presence of the Panchas. The total weight of these tablets was 22,525 Kgs. and he was present when seizure was effected in presence of the Panchas. On his personal search, a pink colour voucher was also secured and seized from him and therein, in English, address of the head office of Dolphin Services, the date '20/6/89' and the No. C/N No. 118334 were written. From the pocket of his person a sum of Rs.1225/- was secured which was returned to him alongwith handkerchief, whereas the pink coloured voucher bearing C/N No. 118334 was seized by the Customs Officer in presence of the Panchas under the Panchnama and all the aforesaid seizure was effected in his presence. It was also admitted by the accused that the tablets seized from him were contraband tablets. He has further admitted that psychotropic substance tablets were manufactured by him in his factory Dexo India situated at G/1/273, Bichwal Industrial Area, Ganganagar Road, Bikaner, Rajasthan and that since 10 to 11 years he had learnt the process of manufacturing them from his experience of medicinal line.

The accused also revealed in his statement that initially he was doing the business of selling medicine in wholesale in his medical store styled as "Satyanarayan Medico" situated opposite Gandhi Hospital and thereafter he started Rin Laboratory at 24, Parijat Society, Jogeshwari West, Bombay, for which he acquired loan licence and he had got medicines manufactured from a famous laboratory, but sold them in the market under his label between 1982 and 1984 and from 1984 to 1987 he did wholesale business in the name and style of Ram Pharma Medical Stores, situated at Rampura Futala, near Kot Gate, Bikaner. The accused also stated in his statement that in 1987 he thought of founding a medicine manufacturing factory. He also stated because of his vast experience in medical line he felt that it would be a very profitable proposition to manufacture psychotropic substance in the form of tablets. The accused has also admitted that he has manufactured these 53,000 psychotropic substance tablets by mixture of (1) Diazepam (2) Promethazine, (3) Biphen Hydramine in the proportion of 5 mg. Diazepam : 25 mg. Promethazine : 25 mg.

Biphen Hydramine and 370 mg. Binding Agents, making it a mixture of 425 mg. and as such the weight of each tablet was 425 mg. He knew that Diazepam is psychotropic substance and it is an offence to possess, sell, transport and manufacture such substance and that it was punishable under the NDPS Act. The accused also stated that the raw material for the purpose of manufacturing 53,000 tablets of which seizure was effected by the Customs Officers was purchased from one Arora & Company, Bhagirath Palace, oppo. Railway Station, Old Delhi and the bill was obtained in the name of Pherjina Joshi, Ram Pharma, Opp. Railway Station, Bikaner because he had in the past a medical store Ram Pharma at Bikaner which was closed by him. He also stated that out of the raw material purchased from Arora & Company, he utilized some material and some material is still lying in the cupboard at the office of Dexo India, Bikaner and that these 53,000 tablets were manufactured by Dexo India between 15/6/89 and 19/6/89 and he had booked the said tablets at Dolphin Services, air courier, Rupam Hotel, Station Road, Bikaner and at that time since he happened to know Shri G.S. Chandak, who was present, he gave the name of consignee as "Jayanti Shah & Company, Ahmedabad", which name he had coined but he had informed Shri Chandak that he would personally take delivery of the parcel at Ahmedabad and at the time of booking he had not informed Mr. Chandak that the parcel contained psychotropic substance tablets. As regards pink coloured consignment note bearing C/N No. 118334 dated 20/6/1989 he had shown that the transport charge of Rs.375/- was to be paid out of which he had paid Rs.200/- to Shri Chandak and promised to pay Rs.175/- on his return from Ahmedabad and so far as the word 'credit' was written on the aforesaid voucher he had not been able to explain. The accused has also stated that after booking the parcel of these tablets he left for Bikaner by train for Ahmedabad at 11.00 a.m. and he reached Ahmedabad at about 7.00 p.m. on 23/6/1989. He went to the house of his sister Sudha Ashik Behani who stays at 15, Chirag Society, near Ankur Bus Stand, Naranpura, Ahmedabad - 13. He has also stated that he had gone to the office of Dolphin Courier, 222, Murli Manohar Market, near Hari Om Market, Revdi Bazar, Ahmedabad and presented pink coloured slip bearing No. C/N No. 118334 dated 20/6/1989 and took the delivery of the parcel. It has also been disclosed in the statement of the accused that after taking delivery of the parcel while he was going to the market for selling 53,000 psychotropic substance tablets, he was accosted by the Customs Officers who took him to the Customs office at Paldi in his ambassador car and seized the said parcel. The accused has also stated that the manufacturing cost

of these 53,000 tablets is only Rs.3500/- but its market value is around Rs.18,000/- to Rs.20,000/- and thus he would have earned profit of Rs.15,000/- to Rs.17,000/-, that he has not got any legal document or bill or voucher or any pass or permit or licence to possess these tablets and that in his statement he has also manifested that he has voluntarily made statement without any threat or inducement; that he read the statement before signing the same and it was written as per his say.

4. At the trial, his defence was that of denial. He has filed his further statement at the time of recording his statement u/S. 313 of the Code of Criminal Procedure, wherein he has stated that he is the power of attorney holder of his father and his wife, who were partners in the firm of Ram Pharma Distributors, Bikaner, who was having a shop for selling medicines in wholesale, that they have obtained licence for the said shop since 1980 under the Drugs and Cosmetics Act, which has been renewed till the end of 1991, that he is administering the business and one Vijayprakash Joshi is also working with him, that the nos. of the licences issued to them are 660 and 661 dated 26/6/1980 which have been renewed from time to time and the licences were in Form No. 21-C and Form No. 20-B and Form No. 21-B of the rules framed under the said Act. According to him, Diazepam tablets are mentioned in Schedule-II of the Rules framed under the said Act and, therefore, he was entitled to sell the said drug in wholesale on the basis of the licences issued to them. According to his defence he sold 53,000 Diazepam tablets to M/s. Jayantilal & Co. of Ahmedabad, in Bikaner as a person doing business of Ram Pharma Distributors. These tablets were purchased by Ram Pharma Distributors in the course of their business and they were sold to Jayantilal & Co. at Ahmedabad as per their order. As per his defence, a person from the firm Jayantilal Shah & Company went personally to take delivery of the goods and he gave delivery of those tablets to the said person by charging cash for the price of the goods and that the bill for the same was also prepared in his presence in his shop. As per his say, he has no knowledge as to what happened to the goods sold to Jayantilal Shah & Co. According to him he has not booked the goods sold to Jayantilal Shah & Co. from Bikaner nor has he sent the parcel containing the said tablets to Dolphin Courier Service, Ahmedabad. He has denied that he has received the parcel containing said tablets. He has denied that he has taken delivery of parcel containing 53,000 psychotropic substance tablets from Dolphin Courier Service on 24/6/1989 as alleged. He has also denied that he has gone to the office of Dolphin

Courier Service. He has denied that he has signed in the delivery book of said courier service in token of having received the parcel in question and that the story put forth by the Customs Officers is a concocted story. He has stated that as a matter of fact, he had gone to the house of Ashok Behani with whom his cousin sister has been married, with a view to call his cousin sister on the occasion of marriage of brother of Ashok and while he came to Ahmedabad, he had also brought a sample bulb of 200 votts from his factory with a view to ascertain as to whether they would be getting market for the same. He has stated that on 24.6.1989, he had gone to the office of Ashok Behani situated at Madhupura, Ahmedabad and then he came out from the office at about 3.00 p.m. when one Officer of the Customs Department Shri Rathod and the complainant Superintendent Shri Trivedi caught hold of him and took him to the Paldi Office of the Customs Department. In his further written statement, he has also stated that he was detained in custody by the officers of the Customs Department from 24/6/1989 to 26/6/1989 and that he was not allowed to go out of the office of the Custom Department on the night of 24/6/1989 and 25/6/1989. He has also stated that he was tortured by many Custom Officers and although he has stated that their firm Ram Pharma Distributors holds a licence under the Drugs and Cosmetics Act and that he is a power of attorney holder and Jayantilal & Company has purchased 53,000 tablets of psychotropic substance from them at Bikaner, a false case has been concocted against him. He has also denied that they are keeping mandrex tablets in their shop. He has asserted that the officers of the Customs Department did not permit him to contact Shri Ashok Behani. He has denied that the consignment note was found from his possession and that he had sent the parcel containing the name of Jayantilal M. Shah as a consignee. He has also denied that he was served with summons to remain present on 24/6/1989 and 25/6/1989 before the Customs Officer. As per his say, his signatures were obtained on both the summonses on 26/6/1989 in the afternoon and at that time he was in the custody of the Customs Department. As regards his statement recorded by the Customs Department, it is his say that the officers of the Customs Department have beaten him and that he was not allowed to sleep at night nor was he provided any food and they obtained his signature on certain documents under coercion on 25/6/1989. As such he has not signed any document on 24/6/1989 and that the so called statements were recorded by the officers of the Customs Department as per the fancy and imagination of the Customs Officers. He has denied that he has taken delivery of any parcel from one

Ghanshyamsing who is shown to be an employee of the Dolphin Services, Ahmedabad and has also stated that he has not signed in any book of Dolphin Services Ahmedabad, nor has he met said Ghanshyamsing as alleged. He has further stated that the Drug Controller of India Dr. Prem K. Gupta has issued one circular as per which it is not an offence to sell Diazepam tablets of various potency, even though Diazepam is shown as a psychotropic substance in the Schedule appended to the NDPS Act. He has alleged that though the Customs officers knew all these facts they concocted false case against him in order to falsely implicate him in the case under NDPS Act.

5. In support of his defence the accused has examined 8 witnesses. D.W. 1 Shivdas Bulakhidas Vyas, exh. 73 is an employee in Medical and Health Department, Government of Rajasthan who has proved the licences at exh. 75 and 76 issued to Ram Pharma Distributors, a medical store. D.W. 2 Chandru Sevakram exh. 77 is an employee of Telegraph Office in Bikaner, who has proved that the telegram at exh. 78 was sent from Ahmedabad to the accused at Bikaner and was delivered to him. D.W. 3 Sirajbhai Ismailbhai ex. 81 is the Jailor of Sabarmati Central Prison who has forwarded the application of the accused from Sabarmati Central Prison to the Customs Department. D.W. 4 Navnitbhai Manibhai exh. 83 is the owner of Raj Medical Stores, Ahmedabad, who has produced the licences of his shop and has deposed that Diazepam tablets could be sold in wholesale as also in retail, but in retail they are to be sold on prescription of the doctor. D.W. 5 Vaidnathh Kannan Lalguddi, ex. 89 is the Deputy Drugs Controller of India and he has produced the draft copy of the circular issued by the Drugs Controller of India to the State Drugs Offices and the Zonal Offices. D.W. 6 Kirit Ramanlal Raval, exh. 91 is the Legal Adviser of the Drugs Control Department of the Government of India who has produced a letter addressed to M/s. Champaneri, Chemical Agency, Baroda. D.W. 7 Rajendra Jawahar Lonia, exh. 93 is the Chartered Accountant, who has drafted the power of attorney of the partners of the firm Ram Pharma Distributors and got it executed and attested. D.W. 8 Ramajibhai Chunilal Periwal, exh. 95 is the father of the accused.

6. The Ld. Addl. Sessions Judge, after hearing the submissions made on behalf of the accused as well as the prosecution, and appreciating the defence version, held that on 24/6/1989 at about 4.30 p.m. at Murli Manohar Market, near Hari Om Market, the accused was found in possession of 53,000 tablets of Diazepam, which is a



psychotropic substance and that it was an offence punishable u/S. 22 of the NDPS Act. That is how the accused is before this Court.

7. The appeal was admitted on 13/9/1990 and notice as to bail was issued by making it returnable on 20/9/1990. R & P was called for and appeal was ordered to be expedited and prayer for bail was not pressed by the accused.

8. When this appeal came up for hearing before this Court, Mr. Vyas learned advocate for the accused has submitted that the accused would not like him to argue before this Court. He was accordingly permitted to intimate the accused about the progress of hearing of this appeal and he accordingly sent telegram to the accused on 8/12/1999 and thereafter since Mr. Vyas was the advocate who was appearing for the accused was required to continue arguments. He has accordingly argued the matter since he was conversant with the facts of the case having conducted the matter before the Ld. Addl. Sessions Judge and at the conclusion of his arguments we have heard Mr. S.P. Dave, Ld. A.P.P. for the State and Mr. Uday Vyas, Ld. Addl. Standing Counsel appearing for the Central Government. When this judgment was in progress today, (15/12/1999), Mr. Vyas, learned advocate for the accused submitted that so far he has not received any communication from the accused, who, according to him, was transferred from the jail in the State of Gujarat to the jail in the State of Rajasthan pursuant to the order of the Hon'ble Supreme Court. He, however, submitted that this appeal has remained before this Court and the same has not been directed to be transferred anywhere else. Therefore, we accordingly proceed to consider the submissions made on behalf of the accused.

9. Mr. Vyas, learned advocate appearing for the accused has read over before us the evidence adduced both by the prosecution as well as by the defence before the trial Court. Firstly, he submitted that the main witness PW 3 Mr. Trivedi Exh. 17 has introduced the prosecution case and there are variations in the evidence of other witnesses in so far as how the prosecuting party reached the place of the incident is concerned. He also submitted that the confessional statements of the accused were obtained by duress and coercion as alleged in the defence. He next submitted that M/s. Ram Pharma Distributors held the licences which were renewed under the Drugs and Cosmetics Act and the accused was acting on behalf of the said Ram Pharma Distributors and the

accused has explained his possession of 53000 tablets of Diazepam under valid licence. Finally, he has submitted that there has been violation of section 50 of the NDPS Act and, therefore, conviction of the accused u/s. 22 of the NDPS Act deserves reversal.

10. On behalf of the prosecution, it has been submitted that the prosecution has set out consistent story in the evidence of all the witnesses and even if there might be some variations, it would be minor in nature. Diazepam is one of the psychotropic substances which has been mentioned in the First Schedule of the NDPS Act. Therefore, it was a prohibited psychotropic substance under the Act itself. According to the prosecution, no legal and valid licence even under the Drugs and Cosmetics Act has been placed on record to show that either the accused or the firm on whose behalf he was acting had legal and valid licence in respect of the substance 'Diazepam'. Finally, it has been submitted that Mr. Trivedi being the Superintendent of Customs was himself a Gazetted Officer and in the facts and circumstances of the case revolving round recovery of 53000 tablets in question, which is a psychotropic substance, need not have to ask the accused about his search in presence of any other Gazetted Officer or a Magistrate.

11. We would, therefore, proceed to deal with the submissions so made on behalf of the rival parties. We would first deal with the facts of the prosecution case as narrated by the concerned witnesses. PW 1 Abdul Hamid, Exh. 4, Superintendent in Customs, Porbandar received specific information regarding one person coming to take delivery of 53000 tablets of diazepam in Ahmedabad. The information disclosed that at about 4.00 p.m. said person was to take delivery of parcel containing such tablets. Upon receipt of such information from the informant, he took the informant to the Head Office of the Customs Department, located in Navrangpura and to the Addl. Collector of Customs, in his Chamber. He discussed the matter with him and thereafter, the Addl. Collector of Customs telephoned the Asstt. Collector of Customs Shri Varma and then he was instructed to see the Asstt. Collector of Customs Shri Varma to do needful. At that time, the Superintendent of Customs Mr. M.G.Trivedi was present. 2/3 Inspectors were also present. Mr. Trivedi and Mr. Varma discussed the information and then he wrote it down in the Form DIR-I and put it in a sealed cover and gave it to the Asstt. Collector of Customs Mr. Varma. After

recording the said information, Officers of the Customs Department namely Mr. Trivedi, Mr. Maulavi, both the Superintendent of Customs, Mr. Rathod and other Inspectors namely Mr. Mina, Mr. Vyas and Mr. Pathan went to the place of incident as aforesaid. Some of them went by Ambassador Car of the Department and rest went there on their scooters. They then went to the second floor of Murli Manohar Market where office of the Dolphin Courier Services was located. The Officers took their respective position. The Superintendent Mr. Trivedi also arranged for calling the panch witnesses. At about 4.30 p.m., the informant who was with Mr. Maulavi identified the accused coming from the office of the Dolphin Courier Services for taking delivery of the parcel in question. Mr. Maulavi, in turn, alerted the Inspectors. As soon as the accused came out with the parcel in question in his hands, he was accosted by the Customs Officers and questioned about his name and whereabouts and as to what was contained in the parcel in question. The accused replied that the parcel contained medicine tablets, while revealing its particulars. After such preliminary interrogation, he was taken with the parcel in his hands to the Paldi Divisional Office of the Customs Department. Panch witnesses also accompanied them. The parcel was opened and checked in presence of the panchas. It was noticed that one box was wrapped in jute and the parcel was tied with ribbon. On opening the card board packet in presence of the panch witnesses, 53 plastic bags containing muddamal tablets were found. On being asked as to from what material the tablets were prepared, the accused told that they were prepared from mixture of diazepam and promethazine. Upon being asked as to whether he has got any licence or permit or pass for keeping such huge tablets with him, he replied that he did not have any licence, pass or permit. Therefore, the muddamal tablets were seized in presence of the panchas as per the panchanama and after the panchanama was so recorded, the witness Mr. Maulavi went home. In his cross examination, the witness has stated that the informant might have reached him at his residence between 12.30 pm to 1.00 p.m. on the day of incident and that the informant was known to him and not to other officers and that he immediately took the informant to the Navrangpura Office of the Customs Department. Ultimately, the information was reduced to writing as stated in his examination in chief. DRI-I was prepared and the said Form was placed in the record at Exh. 6, copies thereof were handed over to the SE Customs Mr. Varma. As per the say of this witness in the cross examination, after he met the Addl. Collector of Customs at Navrangpura Office, the Additional Collector

telephoned the Asstt. Collector of Customs Mr. Varma and, thereafter, the Addl. Collector of Customs directed him to see Mr. Varma in Paldi Office of the Department and he might have reached Paldi Office at about 1.45 pm. The learned Addl. Sessions Judge has dealt with the contradiction as submitted on behalf of the defence in paragraph 13 of the judgment and has come to the conclusion that the variation as alleged would not amount to such discrepancy as can be said to be a material discrepancy. The learned trial Judge has also dealt with some variation with regard to the presence of Mr. Maulavi at the time of drawing of the panchanama. What is material to be noted in the context of the submission made before this Court is the manner in which the prosecuting party reached the place of incident. There is no variation pointed out from the cross examination of the witness Mr. Maulavi. However, reference has been made to the evidence of Mr. Trivedi, Exh. 17, in this respect. According to this witness, after Mr. Maulavi reached the Paldi Office and after the information was disclosed and recorded, members of the raiding party started from Paldi Divisional Office and reached the aforesaid Courier Service at about 4.15 p.m. with Inspectors Mr. Pathan, Mr. Mina and the Superintendent Mr. Maulavi as also with the witness Mr. Trivedi and other Officers. After reaching the second floor of Murli Manohar Market, he took position on the right side in the lobby opposite Dolphin Courier Service at some distance. The Inspectors M/s. Mina and Pathan were at some distance from him. The Superintendent Mr. Maulavi was at some distance from M/s. Pathan and Mina and then at about 4.30 pm, the incident in question took place. The learned Addl. Sessions Judge has observed that the say of this witness stands fully corroborated on all material points by the testimony of prosecution witnesses Mr. Mina, Customs Inspector Exh. 46, Mr. Ashokkumar Vyas, Customs Inspectors Exh. 49 and Mr. Pathan, Exh. 59. Dealing with the discrepancy including the one which has been canvassed before this Court, the learned Addl. Sessions Judge has stated that the variation in stating the route the prosecuting party followed while going to the place of incident could not be said to be such vital or material variation as would dislodge the prosecution story. He accepted the submission of Mr. Abichandani, who appeared on behalf of the prosecution that no criminal case would be free from such type of shortcomings. A reference was made to the decision of the Apex Court in the case of Krishna Pillai Sreekumar v/s. State of Kerala, reported in AIR 1981 SC pg. 1237, and it was submitted that no doubt the prosecution evidence suffers from some inconsistencies and

discrepancies here and there, but that, according to him, is such a short coming from which no criminal case is free. The learned trial Judge has, therefore, held that the accused is not entitled to any benefit of such discrepancies and has accepted the submission of the learned Special P.P. based on the decision of the Supreme Court as aforesaid.

We have gone through the depositions of the above witnesses. No other view is possible upon going through the prosecution evidence, if read as a whole. In that view of the matter, submissions of Mr Vyas Id. advocate for the accused with regard to variation in the manner in which the prosecuting party reached the place of incident cannot be accepted.

12. Then is the submission of the learned advocate for the accused with regard to the confessional statement. He submitted that the confessional statement of the accused was obtained under duress and coercion as per the allegations made in the defence. He made reference to the application sent through the Jailor of Sabarmati Central Prison, at Ahmedabad, wherein the accused had an occasion to make allegation with regard to the story of duress and coercion. It is in this connection the reference has been made to very salient features of the prosecution case. Since there is no dispute with regard to the facts from which these salient features flow, we might refer to the facts from paragraph-18 of the judgment. Referring to the evidence, the learned Additional Sessions Judge has observed that the accused was arrested at 16.00 hrs. ( 4.00pm.) on 26.6.1989 and, he was produced with production report before the learned Chief Metropolitan Magistrate, Ahmedabad on the same day at about 17.00 hrs. (5.00pm.) The production report alongwith the accused was submitted to the learned Chief Metropolitan Magistrate and the same is at Exh. 42 in the record of this case. The learned Chief Metropolitan Magistrate has made endorsement in the said report that the accused was produced before him. It would be important to note that the accused has not at all complained of any physical torture, duress or threat or coercive treatment given by the officers of the Customs Department at or before the time he was produced before the learned Chief Metropolitan Magistrate. He was, therefore, remanded to the judicial custody. This, in our considered opinion, would be a very material and, vital feature of the prosecution evidence including the documentary evidence in the form of production report as aforesaid. Even in the context of the defence, this was

the first and foremost opportunity for the accused to make grievance before a judicial officer when he was produced before the learned Chief Judicial Magistrate. If he had made such grievance, he could have been sent for medical examination. He does not appear to have made any such complaint of duress or coercion before the Chief Metropolitan Magistrate. The learned Addl. Sessions Judge has considered all other aspects of the prosecution case and evidence and has come to the conclusion that the voluntary confessions made by the accused and appearing at Exh. 20 and 22 were not made by the accused under duress, coercion or any threat as alleged by the accused. In this connection, the learned Addl. Standing Counsel referred to the decision of this court in the case of Bipin A. Patel vs. State, reported in 1998 (1) -39(1) GLR p. 589. This court had an occasion to consider similar argument in the context of Sec. 24 of the Evidence Act. Following observations might be reproduced:

"8. The aforesaid statement of, the accused Bipinbhai Ashabhai Patel, as stated above, has been questioned by Mr. Barot, learned Counsel appearing for the appellant. He has submitted that the said statement cannot be said to be voluntary as contemplated under sec. 24 of the Evidence Act. As stated above, his submission is that the accused was already apprehended at Bombay and remained all through in the custody of the concerned officers till upto the time his second statement was recorded and since custody could not be said to be legal, as it was for a period of more than 24 hours, that would deprive voluntary nature of the statement in question. We may, therefore, first reproduce sec.24 of the Evidence Act:-

'24. Confession caused by inducement, threat or promise when irrelevant in criminal proceeding.- A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him unreasonable, for

supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him.'

9. In support of his submission, Mr. Barot placed reliance upon a decision of the Apex Court in the case of Percy Rustomji Basta v. State of Maharashtra, reported in AIR 1971 SC 1087. He read before us what has been said by the Hon'ble Supreme Court in paras 20 and 21 of the citation. Reference has been made to a summons issued by the Customs Authorities by virtue of provisions contained in sec. 108 of the Custom Act. We may not take ourselves to the discussion of this decision, for Mr. Patel, learned Additional Standing Counsel has made a reference to a decision of the Apex Court in the case of KI Pavanny v. Assistant Collector (HQ) Central Excise Collectorate, reported in 1997(3) SCC 721. Dealing with the submission flowing from section 24 of the Evidence Act and making a reference to the case of P. Rustomji Basta (supra), following observations have been made in para 14 of the citation:-

".....In Percy Rustomji Basta v.

State of Maharashtra (AIR 1971 SC 1087) a Bench of two Judges considered the question whether by reason of recording of the evidence during the course of the inquiry under the Act the statements would be construed to be compulsive statements emanating from persons in authority so as to become inadmissible under sec. 24 of the Evidence Act. In para 20 (SCC para 18) of the judgment, it was held that it was not disputed that PW 5 who recorded the confession was a person in authority within the Act. But the question was whether, when PW 5 drew the attention of the appellant to the fact that the inquiry was a judicial proceeding to which sec. 193 IPC applied and that the appellant was bound to speak the truth, it could be considered to be threat, inducement or promise emanating from a person in authority under the section. In para 24 (SCC para 22 p. 854), it was considered and held that:

a person summoned under sec. 108 of the

Act is told by the statute itself that under threat of criminal prosecution, he is bound to speak what he knows and state it truthfully. But it must be noted that a compulsion to speak the truth, even though it may amount to a threat, emanated not from the officer who recorded the statement, but from the provisions of the statute itself. What is necessary to constitute a threat under sec. 24 of the Evidence Act is that it must emanate from the person in authority. In the case before us, there was no such threat emanating from PW 5, who recorded the statement of PW 19, who was guiding the proceedings. On the contrary, the officer recording the statement were only doing their duty in bringing to the notice of the appellant the fact that the inquiry conducted by him is deemed to be a judicial proceeding, to which sec. 193 IPC applies, the appellant was bound to speak the truth when summoned under sec. 108 of the Act with the added risk of being prosecuted, if he gave the false evidence.

It was further held that (SCC 854 para 23)-

"It is not every threat, inducement or promise even emanating from the person in authority that is hit by section 24 of the Evidence Act. In order to attract the bar, it has to be such an inducement, threat or promise, which should lead the accused to suppose that 'by making it he would gain any advantage or avoid any evil of temporal nature in reference to the proceedings against him'. In the case before us, what is it that the appellant has been told? He has been told that the law requires him to tell the truth and if he does not tell the truth, he may be prosecuted u/S. 193 IPC for giving false evidence."

The plea of the appellant therein was that he was compelled to make the statement under the threat that otherwise



his mother and another brother would be prosecuted. He had stated that he was induced to make statement on the belief that it will be used only against the second accused and not against him. These pleas of the appellant therein had been disbelieved by both the trial Court and the High Court. Therefore, it was held that even assuming that there was an inducement or threat, the appellant therein had no basis for supposing that by making the statement he would gain any advantage or avoid evil with reference to the proceedings in respect of which an inquiry was being conducted by the Customs Officers. Therefore, even on this ground also section 24 of the Evidence Act had no application. The above ratio squarely applies to the facts in this case. The appellant was under a legal duty to state the facts truthfully lest he would be liable to prosecution. The threat emanates from and is that of the statute and the officers merely enforced the law. The allegations as to the threat of implication of his wife was an after thought and he did not mention the same when he appeared before the Magistrate and obtained bail."

It is no-doubt true that in the present case reference has been made to section 67 of the NDPS Act in the respective summons given to the accused. The concerned Custom Authorities have also made inquiry by virtue of provisions contained in sec. 108 of the Customs Act and reference of that provision has also been made. In the present case, the accused has challenged not only his second statement, which has been called in question by the learned counsel for him before us, but he challenged before the learned Additional Sessions Judge even his first statement, which is rightly submitted by Mr. Barot to be exculpatory statement. Mr. Barot had taken us to the accused's retraction as contained in exh. 47 which was sent on 16/2/1989 by the second accused from the Central Jail, Sabarmati, Ahmedabad to the Ld. Chief Metropolitan Magistrate, Ahmedabad. There he has alleged that he was illegally apprehended on 9/2/1989 by the Inspector, Preventive Branch,

Customs, Bombay and was brought by Baroda Express Train during night time from Bombay to Baroda and from Baroda to Ahmedabad by a State transport bus and was entrusted to the Superintendent, Customs Department, Custom House, Head Quarter, Navrangpura, Ahmedabad at about 11.00 O'clock in the morning. He has alleged that the Customs Authorities at Bombay and Ahmedabad had beaten him, induced him and pressurized him and by giving him mental torture had obtained signatures on some papers and accordingly he has been falsely implicated in the offences under the NDPS Act. The Ld. Addl. Sessions Judge dealing with the submission flowing from this document, has concluded that the accused did give his statement voluntarily in as much as he had the opportunity to express himself before the learned Magistrate before whom he was first produced. A reference in this connection had been first made to the arrest memo exh. 54 dated 11/2/1989 and production memo exh. 55 of the same date. The order which has been passed by the Ld. Magistrate of the 6th Court, Ahmedabad would indicate that the accused was produced before him at his residence at 10.15 p.m. by A.M. Maulvi, Custom Inspector and that the Ld. Magistrate heard the accused. Thus, on 11/2/1989 itself the accused had an opportunity to make grievance about any sort of pressure or threatening or inducement before the Ld. Magistrate before whom he was produced. The submission in this regard is that the accused was given to understand that he was being taken to the superior officer and the accused did not allow that he was being produced before the Magistrate. We need not enter into the correctness of this allegation on the part of the accused, since the accused, even if he knew that he was being produced before the superior officer, could have made complaint before such superior officer about any ill-treatment of the kind alleged by him before such superior officer. We have no reason to disagree with the Ld. Addl. Sessions Judge in holding that the grievance made by the accused as aforesaid was an after thought. In the present case as stated above the prosecution has adduced evidence which lend support to all the parts of the prosecution story. It is only the modus operandi for transporting the offending substance that he has come out from the accused. Even the accused has not disputed his possession of the

books in question at the relevant point of time. The fact that he had been appearing as an agent for number of years and the fact that he had been in association with the aforesaid other conspirators for a considerably a long period would indicate the course of conduct on the part of the accused. He was free to come out with a defence that he had at no point of time any occasion to know about the contents of the books but in fact he has come out with a case that main conspirators were the aforesaid persons and he was merely communicating the books, of course, with the knowledge that they contained the offending substance in question, for some remuneration or for some service which he was getting from the aforesaid conspirators. It is thus clear that the prosecution evidence enumerated hereinabove would lead to how the accused was seeing the transfer of the offending books containing the offending substance. Whether a confessional statement was voluntarily made or not is necessarily a decision of fact and this is a settled proposition of law. If necessary, reference may be made to a decision of the Hon'ble Supreme Court in the case of K.T.M.S. Mohd. v. Union of India reported in 1992 Cri.LJ 2781. Reading of para. 33 of the citation would make it clear. We would like to refer to the observations made therein :-

"33. We think it is not necessary to recapitulate and recite all the decisions

on this legal aspect. But suffice to say that the core of all the decisions of this Court is to the effect that the voluntary nature of any statement made either before the Customs Authorities or the officers of Enforcement under the relevant provisions of the respective Acts is a sine qua non to act on it for any purpose and if the statement appears to have been obtained by any inducement, threat, coercion or by any improper means that statement must be rejected *brevi manu*. At the same time, it is to be noted that merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained, it is only for the maker of the statement who alleges inducement, threat, promise, etc., to establish that such improper

means had been adopted. However, even if the maker of the statement fails to establish his allegations of inducement, threat, etc., against the officer who recorded the statement, the authority while acting on the inculpatory statement of the maker is not completely relieved of his obligations in at least subjectively applying its mind to the subsequent retraction to hold that the inculpatory statement was not extorted. It thus boils down that the authority or any Court intending to act upon the inculpatory statement as a voluntary one should apply its mind to the retraction and reject the same in writing."

13. In this matter, no other view is possible. Hence, the submissions made on behalf of the accused in this respect also cannot be accepted.

Next is the submission in respect of the defence of the possession of Psychotropic Substance in question under the authority of licence. We have been taken through the judgment of the learned Addl. Sessions Judge as also the relevant licences. In fact, the original licence has not been produced on record. What has been produced is the renewal licence in Form No. 21C issued under the Drugs and Cosmetics Act and the Rules framed thereunder. First such licence is at Exh. 75 for the period 1/1/1988 to 31/12/1989. Second one is at exh. 76 for the period 1/1/1990 to 31/12/1990. Mr. Vyas learned advocate for the accused has read before this Court the hand written clauses below 1st paragraph thereof. The 1st clause speaks about specified as Schedule-C and C (1). The 2nd clause speaks about the particulars of drug 'other than C & C(1)'. From the words 'other than preceding C and C (1)' appearing in the 2nd clause it has been submitted that all other schedules are covered except schedule 10. In our considered opinion, the words 'other than preceding C and C (1)' in clause 2 in both the documents would be redundant in as much as the succeeding words are 'Except Schedule X drugs'. We have been taken through the various schedules including schedule X and H and we find that the accused has not been able to establish that the Diazepam is one of the drugs or substances, included in their original licence (which has not been produced on record) or renewal licences exhs. 75 and 76. The Ld. Addl. Sessions Judge has discussed at length the provisions of the Drugs

and Cosmetics Act alongwith its preamble, as also the rules framed thereunder and the provisions of the NDPS Act alongwith its preamble and 1st Schedule to the Act itself which speaks about the Diazepam as one of the prohibited psychotropic substances. In this view of the matter, we need not stretch the discussion of the evidence. Suffice it to say that the accused has failed to establish right from the inception till this date that the contraband psychotropic substance in question was in his possession as authorized under any licence or pass or permit. We have gone through the defence evidence while Mr. Vyas read the evidence of all the defence witnesses before us. Even from such evidence we have not been able to notice any such fact. In that view of the matter submission on this score deserves to be rejected.

14. Last is the submission with regard to the observance of the provisions of sec. 50 of the Act. It is true that the accused was not asked as to whether he desired to be searched in presence of Gazetted Officer or a Magistrate but then Mr. Trivedi was not the Officer of the category prescribed in sec. 42 of the NDPS Act. He was Gazetted Officer and above the rank of Customs Inspectors. This Court had an occasion to consider the case of a Custom Officer in the decision reported in the case of M.R. Pathan v. State of Gujarat 1998 (1) GLR 445. Referring to the earlier Bench decision, this Court proceeded to observe as under in the context of the provisions of sec. 50 of the Act :-

"12. It would, therefore, appear that this Court dealing with a similar argument arising from Balbir Singh's case (supra) concluded that such officers mentioned in Sec. 50 of the NDPS Act who are not Gazetted Officers would have to comply with the mandatory provision of sec. 50 of the NDPS Act but the officers who are Gazetted Officers would not have to comply with this provision.

13. Having given our anxious thoughts to the submission revolving round the compliance of section 50 of the NDPS Act, we are of the opinion that the decision in the case of DB Thakur (supra) rendered by the Division Bench of this Court considering Balbir Singh's case (supra) will apply to the facts of the case before us. We would, however, appreciate the efforts of Mr. Budhbhatti in seeing that the proposition which he has sought to canvass is placed in its right

perspective. He has for that purpose, made a reference to a couple of decisions of the Apex Court.

14. The first one is contained in the case of Raghbir Singh v. State of Haryana, reported in 1996 SCC (Cri.) 266. It would be useful to note the observations appearing in paras 10 and 11 of the citation:-

'10. Finding a person to be in possession of articles which are illicit under the provisions of the Act has the consequences of requiring him to prove that he was not in contravention of its provisions and it renders him liable to serve punishment. It is, therefore, that the Act affords the person to be searched a safeguard. He may require the search to be conducted in the presence of a senior officer. The senior officer may be a Gazetted Officer or a Magistrate, depending upon who is conveniently available.

11. The option under sec. 50 of the Act, as it plainly reads is only of being searched in the presence of either a Gazetted Officer or of being searched in the presence of a Magistrate. The use of the word 'nearest' in sec. 50 is relevant. The search has to be conducted at the earliest and, once the person to be searched opts to be searched in the presence of such senior officer, it is for the police officer who is to conduct the search to conduct it in the presence of whoever is the most conveniently available, Gazetted Officer or Magistrate. (Emphasis supplied)

It would, therefore, appear that if the officer conducting search is a Gazetted Officer he is the nearest and obviously the most conveniently available officer as required under sec. 50 of the NDPS Act.

15. The next one is in the case of State of Punjab v. Labh Singh, reported in 1996 SCC (Cri.) 103 where valuable right of the accused conferred under sec.50 of the NDPS Act was under

consideration. The apex Court has observed that each case should be considered in light of the facts and circumstances in which the contraband was seized viz. the time when the search was conducted, the place where it was seized, whether police had prior information of the contraband being in transport or place of concealment, whether there was proper opportunity for the police to secure the presence of a Gazetted Officer, whether the delay in search and seizure would result in the escape of the accused from arrest or contraband would be destroyed or whisked away and a host of all relevant attendant circumstances. Each case depends upon its own factual scenario and no exhaustive or mathematical formula of universal application can be laid down. All that would support the view that if the facts of the case are such as necessarily concern the raiding officer who is a Gazetted Officer, there would be no violation of sec. 50 of the NDPS Act merely because it is not appearing in the record that the accused was not questioned whether he wanted to be searched or examined in the presence of the Gazetted Officer or a Magistrate. That is exactly what has happened in the present case."

Mr. Uday Vyas, learned Addl. Standing Counsel appearing for the Department has shown before this Court Schedule to the notification dated 17/12/1986 of the Government of India, Ministry of Finance, Department of Revenue published in Part-II, section 3, in the Gazette of India. This notification relates to the rules of recruitment in the Central Excise Department to the post of Superintendent of the Central Excise in the Collectorate of Central Excise. Schedule to this notification clearly indicates that the Superintendent of Central Excise is classified as 'General Central Service Group B Gazetted, Non-Ministrial'. Mr. Uday Vyas has submitted that at the relevant point of time there was no separate classification of Superintendent of Central Excise and the Superintendent of Customs. However, bearing in mind the above decision of this Court in respect of Officer of Customs such as Custom Inspector, who is lower in rank to the Gazetted, there may be little doubt about the Gazetted position of the Superintendent of Customs, Mr. M.G. Trivedi, Searching Officer as also the complainant. He was, as a matter of, fact the Superintendent of Customs and he had an occasion to

search the box which was in the hands of the accused. Besides, the facts of the prosecution case which can hardly be disputed clearly indicate that right from the beginning the accused came out of the office of the Dolphin Courier Services he held in his hands said packet and that was quite visible to the people at large. Before the box and packet was opened, the accused was questioned and the accused answered that the contents in the box were medicines and were particular class of medicine. It is possible that the accused must have been harbouring under the impression that a licence under the Drug and Cosmetics Act or its renewal might leave the matter in a state of confusion. That possibly might have been the reason why the accused gave answers to the questions put to him before the packet and box came to be opened in the presence of the Panch witnesses. Therefore, it is not that the person of the accused was physically searched before all that happened. Be that it may, in view of the aforesaid decision of this Court, the defence about the noncompliance of sec. 50 as also the noncompliance of other provisions of the NDPS Act will not be available to the accused in this case.

The Ld. A.P.P. for the State has not made any further submissions before us.

15. Having gone through the evidence read by the Ld. Advocate for the accused and having considered the submissions made on behalf of the accused, we are of the opinion that the impugned judgment and order passed by the Ld. Addl. Sessions Judge cannot be faulted.

In the result, this appeal is dismissed.

(M.S.Parikh,J.)

(H.K.Rathod,J.)

Vyas